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Annual Survey of Virginia Law - Civil Procedure and Practice

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CIVIL PROCEDURE AND PRACTICE

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This article considers recent developments in the field of Virginia civil procedure and practice, including statutes, rules of court, and opinions of the Supreme Court of Virginia and the Court of Appeals of Virginia that have appeared between May 1985 and May 1986. This article also comments on cases in volumes three and four of *Virginia Circuit Court Opinions*, many of which were decided before 1985, but it is appropriate to mention them here since they were only recently made generally available through publication.

There have been no major changes in the area of Virginia civil procedure during the period considered, but the matters noted here may prove useful to keep the reader current with the most recent authority for the various already settled principles of practice and procedure.

In order to facilitate the discussion of numerous Virginia Code sections, they will be referred to in the text by their section numbers only.

I. Appeals From District Courts

An appeal from a district court and the subsequent trial de novo involves the entire case and all of the original parties.[1] Therefore, an appeal from the general district court to the circuit court transfers the entire file to the circuit court; thus, the principal claim and the counterclaim are inseparable for purposes of appeal.[2] Following a decision of a general district court on a claim and a counterclaim that was appealed by the plaintiff but not by the counterclaimant, the circuit court will rehear the counterclaim along with the plain-

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1. Grinnel Fire Protection Sys. Co. v. Sills, 3 Va. Cir. 489 (Alexandria 1979).

2. General Fin. Corp. v. Woody, 3 Va. Cir. 462 (Richmond 1975) (construing Va. Code Ann. § 16.1-106 (Repl. Vol. 1975)).

tiff's claim.[3] Since the jurisdiction of the circuit court is derivative, a counterclaim made in the circuit court cannot exceed the jurisdictional limitations of the district court.[4]

The time limit for removing a case from a general district court to a circuit court is procedural, not jurisdictional, and it can be waived by the failure to appeal from the removal order.[5]

A circuit court has no jurisdiction over the interlocutory orders of a general district court.[6]

To perfect an appeal from a general district court to a circuit court, an appeal bond must be timely filed.[7]

II. Service of Process and Notice of Claims

A. *General*

Service of process made by posting at an office is invalid; substituted service under section 8.01-296(2)(b) can be accomplished only at a defendant's "usual place of *abode*."[8]

A person who comes into Virginia to attend court is exempt from service of process.[9] Furthermore, when a defendant is tricked into entering Virginia in order to be served with process, such service is invalid.[10]

In *Stephens v. Stephens*,[11] Mr. Justice Thomas, writing on behalf of a unanimous court, held that the "registration of a foreign decree in Virginia, pursuant to RURESA, coupled with personal service on the defendant in a foreign jurisdiction is not sufficient to create *in personam* jurisdiction over [a] defendant in Virginia."[12]

The filing with the commonwealth's attorney of a notice of a

3. Boyce v. Athey, 4 Va. Cir. 19 (Frederick County 1980).

4. Willett v. McCullar, 3 Va. Cir. 135 (Alexandria 1983); Gunter v. Platte, 3 Va. Cir. 16 (Alexandria 1981).

5. Keith v. Blue Cross/Blue Shield, 3 Va. Cir. 47 (Alleghany County 1982).

6. Commonwealth v. Ragno, 3 Va. Cir. 48 (Arlington County 1982).

7. Swimley v. Lamp, 4 Va. Cir. 22 (Frederick County 1980).

8. Va. Code Ann. § 8.01-296(2)(b) (Repl. Vol. 1984) (emphasis added); *see* Hall v. Bird, 3 Va. Cir. 187 (Alexandria 1984).

9. Voelker v. Voelker, 3 Va. Cir. 78 (Arlington County 1983); *see also* Commonwealth v. Ronald, 8 Va. (4 Call) 665 (1786). *Contra* Lester v. Bennett, 1 Va. App. 47, 333 S.E.2d 366 (1985).

10. Lines v. Lines, 3 Va. Cir. 111 (Arlington County 1983).

11. 229 Va. 610, 331 S.E.2d 484 (1985).

12. *Id.* at 619, 331 S.E.2d at 489.

claim against a city does not satisfy the requirements of section 8.01-222.[13] Likewise, actual oral notice given to a city attorney of a claim of municipal negligence fails to satisfy the requirements of this statute.[14]

The notice of a claim of medical malpractice, required by section 8.01-581.2, must give a "reasonable description" of the complained of acts.[15] Since notice of a claim for medical malpractice is a prerequisite to litigation, a cause of action not stated in the notice cannot be sued upon.[16] However, the notice of a claim for medical malpractice can be amended to include additional claims or parties. This can be done upon motion to the presiding judge, who may allow such amendment in his sound judicial discretion in furtherance of the ends of justice. The judge may not grant leave to amend if the motion is made within ten days of the hearing, if the motion is without merit, or if the statute of limitations has expired as to the new claims or parties.[17]

B. *Long Arm Statute*

Long arm jurisdiction exists under sections 8.01-328.1(1) and (2) where a management recruitment firm arranges an interview in Virginia and guarantees the work to be performed in Virginia.[18] Service of process through the long arm statute can be had upon a parent corporation whose subsidiary and agent is transacting business in Virginia.[19]

A statement in a brochure which is not an offer but a mere solicitation sent into the state is not a "transacting" of business for the purposes of the long arm statute.[20]

Code section 8.01-328.1(8) has been held not to apply where an ex-husband had been ordered to pay child support until the child was eighteen and, after the child had become eighteen, the ex-wife (custodial parent) sued for support of the same child on the

13. Nicely v. City of Clifton Forge, 3 Va. Cir. 87 (Clifton Forge 1983).
14. Lash v. City of Alexandria, 3 Va. Cir. 336 (Alexandria 1985).
15. Glen v. DeLorme, 3 Va. Cir. 349 (Fairfax County 1985); Adams v. Wright, 1 Va. Cir. 433 (Richmond 1984). The notice given in these two cases was too indefinite.
16. Monk v. Alexandria Hosp., 4 Va. Cir. 68 (Alexandria 1982).
17. VA. CODE ANN. § 8.01-581.2:1 (Cum. Supp. 1986).
18. General Servs. Corp. v. Specialty Consultants, Inc., 3 Va. Cir. 31 (Richmond 1981).
19. Word Processing Assocs. v. BDT Prods., Inc., 3 Va. Cir. 116 (Arlington County 1983).
20. Keene v. Pier, 3 Va. Cir. 99 (Arlington County 1983).

grounds of the child's incapacity.[21]

The long arm statute can only be used to obtain jurisdiction over a person who has purposefully availed himself of the privilege of conducting activities within this state.[22]

C. *Dismissal for Failure to Serve Process Within One Year*

The plaintiff must exercise due diligence to have defendants served with process within one year after filing, according to Virginia Supreme Court Rule 3:3(c).[23] A motion to dismiss for failure to serve process within one year of filing will be granted no matter when it is made after the year has run. Rule 3:3 is automatic and the court can act on its own motion.[24] Under this Rule, an appearance to have a case dismissed for failure to serve process within one year of filing does not challenge the service of process or the jurisdiction of the court; therefore, it constitutes a general appearance.[25]

III. VENUE

For venue purposes, a cause of action for nonpayment of an obligation due under a contract arises at the payee's place of business under section 8.01-262(4).[26]

Since residency is a matter of intention, imprisonment, being involuntary, cannot by itself change residency. The *forum non conveniens* statute, section 8.01-265, applies to venue in cases under the Tort Claims Act. Finding "good cause" for transferring venue to another forum includes considering the places where the cause of action arose, where the parties and witnesses reside or work, and where documentary evidence is located.[27]

When the defendant is an uninsured motorist, the plaintiff may sue wherever the insurance company regularly conducts its business through an agent.[28]

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21. Nemeroff v. Nemeroff, 3 Va. Cir. 384 (Virginia Beach 1985).
22. Jennings v. Warren, 4 Va. Cir. 438 (Botetourt County 1977).
23. Lorcom House Condominium v. Wells, 3 Va. Cir. 226 (Arlington County 1984).
24. Clark v. Long, 3 Va. Cir. 422 (Arlington County 1971).
25. Olson v. Pearson, 3 Va. Cir. 76 (Arlington County 1983).
26. Moore Loans, Inc. v. B. E. Hardin Enters., Inc., 4 Va. Cir. 360 (Richmond 1985).
27. Shoemaker v. Commonwealth, 4 Va. Cir. 176 (Frederick County 1984).
28. Gates v. John Doe, 4 Va. Cir. 98 (Winchester 1983) (construing VA. CODE ANN. § 8.01-262(3) (Repl. Vol. 1977)).

Section 8.01-264(A) was recently amended so that objections to venue can be raised "within the period of any extension of time for filing responsive pleadings." This makes it clear that the judge can extend the time for objecting to venue when he allows an extension for the defendant to respond to the plaintiff's first pleading, even after the deadline has expired.[29] Also, subsection (C) was added to this section to require plaintiffs in general district courts to inform defendants, in nontechnical language, of their right to object to venue. This is not necessary, however, if the action is brought in the proper forum. Another amendment to subsection (A) permits a defendant in the general district court to make an objection to venue by means of a "letter or other written communication." Thus, when a defendant from Jonesville is sued in the district court in Eastville, he need not go to the Eastern Shore (where the amount sued for may not be very great) to make his objection to venue. It is unfair for a plaintiff to choose an inconvenient and incorrect forum in order to make it difficult for a defendant to go to court and defend himself.

IV. Parties

Failure to comply with section 59.1-69, the Fictitious Name statute, bars a plaintiff's right to sue. The failure of the defendant to object does not waive the requirements of the statute. The plaintiff's compliance before entry of final judgment, however, will cure the defect existing when the action was brought.[30]

Neither a partnership nor a trust fund is an "unincorporated association" for the purposes of suing or being sued under section 8.01-15.[31] However, a condominium unit owners' association may maintain an action.[32]

Although statutory beneficiaries of an estate are entitled to be present at litigation concerning the estate, said litigation is conducted only by the personal representative and only the latter can

29. The same result was reached in Carter v. Mount Vernon Hosp., 3 Va. Cir. 162 (Alexandria 1984) (construing the statute before the 1986 amendment).

30. C. M. Prods. v. Milne, 3 Va. Cir. 4 (Alexandria 1980).

31. Krzyston's Adm'r. v. Teamsters Joint Counsel No. 83 of Virginia Pension Fund, 3 Va. Cir. 479 (Richmond 1976) (trust fund); Buchanan Apartments Assocs. v. Arlington County, 3 Va. Cir. 447 (Arlington County 1974) (partnership).

32. Frantz v. CBI Fairmac Corp., 229 Va. 444, 450-51, 331 S.E.2d 390, 395 (1985) (construing Va. Code Ann. § 55-79.53 (Repl. Vol. 1974)).

compel discovery from the defendants.[33] The statutory beneficiaries are not proper parties, but neither are they strangers to the suit. Note also that an insurance carrier is not a proper party to an action to establish the liability of its insured, but neither is it a stranger to the action.[34]

V. Craving Oyer

If a document relied upon in the plaintiff's motion for judgment is filed with and mentioned in the motion for judgment, no formal profert of that document is needed in modern Virginia practice.[35] However, if the plaintiff's claim is based upon a deed that is not filed with the motion for judgment, the defendant cannot file a demurrer based upon the deed because it is not part of the record. To remedy this situation, the defendant can make a motion craving oyer of the document and the judge will order it to be produced and filed; thus, it becomes a matter of record upon which the defendant can rely in his demurrer.[36]

The defendant can crave oyer of and force the plaintiff to produce bonds, deeds, letters of probate and administration, and court records.[37] One can have oyer only of documents upon which the plaintiff has based a claim of justification.[38] Formerly, oyer of instruments not under seal was not allowed, [39] but now the practice is otherwise.[40]

VI. Res Judicata

The principles of res judicata and the reluctance to give new laws retrospective effect must yield to the more compelling public

33. Leary v. Broughman, 3 Va. Cir. 105 (Bath County 1983).

34. Phelps v. Watts, 2 Va. Cir. 442 (Lynchburg 1975).

35. Va. Sup. Ct. R. 1:4(i); *see also* Va. Sup. Ct. R. 1:4(f). It was not necessary at common law to make profert of instruments that were not under seal.

36. Wood v. Commonwealth, 25 Va. (4 Rand.) 329 (1826); Macon v. Crump, 5 Va. (1 Call) 575, 582 (1799). *See generally* M.P. Burks, Pleading and Practice 633-36 (4th ed. 1952); 14B Michie's Jur. *Profert and Oyer* (Repl. Vol. 1978).

37. Culpeper Nat'l Bank v. Morris, 168 Va. 379, 382, 191 S.E. 764, 765 (1937) (court records); Smith v. Lloyd, 57 Va. (16 Gratt.) 295 (1862) (deed; impossibility excuses production); Moore v. Fenwick, 21 Va. (Gilmer) 214 (1821) (bond); Mason's Stores v. National Co., 3 Va. Cir. 405 (Richmond 1966).

38. Smith v. Wolsiefer, 119 Va. 247, 250, 89 S.E. 115, 116 (1916); Langhorne v. Richmond Ry. Co., 91 Va. 369, 372-73, 22 S.E. 159, 160 (1895).

39. M. P. Burks, *supra* note 36, at 633, 636.

40. *See, e.g.*, Ernst, Inc. v. Blake Constr. Co., 1 Va. Cir. 278 (Richmond 1982).

duty to favor the rights of children. Hence, in *Jones v. Withrow*,[41] a second civil petition to determine paternity was heard because: (1) the law allowing genetic blood grouping tests had been changed since the first hearing, which was dismissed; and (2) the infant was not an independent party at the first hearing. Section 20-61.1, dealing with paternity suits, cannot be applied retrospectively to a child born in 1970 except when actions within the provisions of this section occur subsequent to the amendment of the statute. New laws are presumed to be prospective, not retrospective, in operation.[42]

Where devisees institute legal proceedings to have themselves declared trustees and the court so orders, the descendants of said devisees are bound thereby.[43]

The Full Faith and Credit Clause of the United States Constitution, article IV, section 1, does not require a state to recognize a foreign judgment enforcing a contract that is against that state's own public policy.[44]

During the last session of the General Assembly, a bill was filed to enact the Uniform Foreign Money-Judgments Recognition Act ("Act"), [45] but it failed to pass. This Act would codify the Virginia common-law rules of comity. The foreign country judgment would still have to be domesticated in a Virginia court according to section 3 of the Act. Section 4(2)(3) retains the rule that a foreign judgment which offends the strong public policy of our state will not be granted comity or be recognized. Secion 7 preserves the general common law of comity in matters not covered by the Act. By the common law of comity, which is a doctrine of private international law, the Virginia courts will recognize a judgment of a sister state or of a foreign country as a personal obligation unless it contravenes some Virginia public policy; this obligation constitutes a cause of action in a local court.[46]

The desirability of codifying the common law of comity is to make clear to foreign jurists that their judgments are enforceable in Virginia. Many foreign countries have reciprocity provisions on

41. 3 Va. Cir. 277 (Roanoke 1985).
42. Averette v. Seabron, 3 Va. Cir. 467 (Henrico County 1976).
43. Counts v. Perry, 4 Va. Cir. 149 (Scott County 1984).
44. Greate Bay Hotel & Casino, Inc., v. Furman, 4 Va. Cir. 141 (Newport News 1983).
45. 13 U.L.A. 261-75 (1986).
46. *See* VA. CODE ANN. § 8.01-389(B) (Repl. Vol. 1984).

this subject and their judges will not enforce Virginia judgments unless they are convinced that Virginia courts will enforce theirs. Most European countries have general codes, and their bench and bar feel unsure of themselves when presented with a point of common law. Therefore, when enforcement of a Virginia judgment is attempted abroad, it is more effective to show the judge a statute than a line of judicial opinions to prove that reciprocity exists. The proposed Act will therefore benefit Virginia litigants abroad as a practical matter while adding nothing to the rights of foreign litigants in Virginia. As the commerce of Virginia becomes more international, and as more foreign companies move their operations to Virginia, the passage of this Act will benefit Virginians suing corporations whose assets are located abroad.

The aforementioned Act is completely distinct and separate from the Uniform Enforcement of Foreign Judgments Act,[47] which was also recently proposed and defeated by the General Assembly. This latter act would avoid the necessity of a judgment creditor having to domesticate a sister-state's judgment in a Virginia court. Instead, he could simply file an authenticated copy in the clerk's office. Thus, he could get execution without having to go through any judicial process where the matter is not contested. The clerk or the judgment creditor would mail a notice of the filing to the judgment debtor. At this time, the debtor could go into court to have the levy stayed or vacated. The present procedure requires the judgment creditor to serve a motion for judgment on the judgment debtor; thus, the debtor can appear at the trial to domesticate the foreign judgment and make his defenses at that time. The most frequent defense to foreign judgments is lack of jurisdiction. One could also object on the grounds of forgery of the judgment proffered. The purpose of this proposed legislation is to remove routine, undefended actions in the nature of a debt on a judgment from the dockets of the circuit courts and to domesticate a foreign judgment. This procedural statute would not change any substantive rights. Thus, in a recent case,[48] the judge could have vacated or quashed a New Jersey judgment, had it been filed in Virginia, on the grounds that such judgment (the enforcement of gambling debts) is against Virginia public policy.

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47. 13 U.L.A. 149-205 (1986).

48. *Greate Bay Hotel & Casino, Inc.*, 4 Va. Cir. 141.

VII. Statutes of Limitations

A. *General*

If a case is discontinued under section 8.01-335(A) and later reinstated, it is not barred by the statute of limitations.[49] The statute of limitations may be tolled when the plaintiff is of "unsound mind" without the plaintiff's being adjudicated insane.[50]

B. *Accrual*

A cause of action on a wrongful deduction from a bank account accrues when the depositor is notified of the deduction.[51] The obligation of a demand note accrues on the date it was made.[52]

It was held by the Supreme Court of Virginia, in an opinion by Mr. Justice Cochran, that "where property is in the possession of a bailee, a cause of action in detinue accrues upon a demand and refusal to return the property or upon a violation of the bailment contract by an act of conversion."[53]

Where trustees of a pension and welfare plan have the duty to notify an employee that payments of his life insurance premiums are being terminated and they fail to perform that duty, which is a duty of "continuous service," the statute of limitations does not begin to run until "the termination of the undertaking."[54]

In order to reaffirm the common law as stated in *Nationwide Mutual Insurance Co. v. Jewel Tea Co.*,[55] section 8.01-249(5) was enacted. This section states that a cause of action for contribution or indemnification does not arise until there has been a payment or discharge of the obligation, even though there may have been a third-party claim for an inchoate right to contribution or indemnification. This addition to section 8.01-249 was enacted to override the erroneous opinions in *Rambone v. Critzer*[56] and *Smith-Moore*

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49. Castagna v. Humana of Va., 3 Va. Cir. 71 (Virginia Beach 1982).

50. Schnedl v. O'Donnell, 3 Va. Cir. 113 (Alexandria 1983) (construing Va. Code Ann. § 8.01-229(A)(2)(b) (Repl. Vol. 1977)).

51. Fox v. Guaranty Bank & Trust Co., 3 Va. Cir. 74 (Arlington County 1983).

52. Guth v. Hamlet Assocs., 230 Va. 64, 334 S.E.2d 558 (1985) (construing Va. Code Ann. § 8.3-122(1) (Add. Vol. 1977)).

53. Gwin v. Graves, 230 Va. 34, 37, 334 S.E.2d 294, 297 (1985).

54. Rowlett v. Pearsall, 3 Va. Cir. 372 (Roanoke 1985).

55. 202 Va. 527, 118 S.E.2d 646 (1961).

56. 548 F. Supp. 660 (W.D. Va. 1982).

Body Co. v. Heil Co.[57]

The two-year statute of limitations for medical malpractice, section 8.01-243(A), has been modified by the addition of subsection (C). The period of limitation is now extended to one year after the date of discovery in both the case of a foreign object having been left inside someone's body, and in the case of a fraudulent concealment of a medical condition. However, in no case can such an action be brought after ten years following the accrual of the cause of action. Note that subsection (C) is an extension of subsection (A), not a substitution; it does not reduce the two-year period of subsection (A).

C. *Time Limits*

A seller of land who misrepresents the zoning status of neighboring land has committed a fraud, and the one-year statute of limitations applies.[58] Similarly, it is fraud when a person agrees to sell land to the plaintiff but sells it to someone else, and an action therefore is barred after one year by section 8.01-248.[59]

Malicious prosecution, false imprisonment, and defamation are personal actions covered by the one-year limitations period of section 8.01-248. Assault and battery, however, are personal actions for personal injuries covered by the two-year limitations period of section 8.01-243(A).[60]

The Supreme Court of Virginia, in an opinion by Mr. Justice Russell, ruled that the five-year statute of limitations of section 8.01-250 protects parties who manufacture or supply construction materials that are incorporated into a building.[61]

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57. 603 F. Supp. 354 (E.D. Va. 1985).

58. Pigott v. Moran, 231 Va. 76, 341 S.E.2d 179 (1986) (construing VA. CODE ANN. § 8.01-248 (Repl. Vol. 1984)).

59. Barney v. Bell, 3 Va. Cir. 93 (Virginia Beach 1983).

60. Reinforced Earth Co. v. Ashcraft & Gerel, 3 Va. Cir. 143 (Alexandria 1983) (defamation); Beasley v. Kayo Oil Co., 3 Va. Cir. 119 (Chesterfield County 1983).

61. Cape Henry Towers, Inc. v. National Gypsum Co., 229 Va. 596, 331 S.E.2d 476 (1985).

VIII. Discovery

A. *General*

A defendant can take a deposition as soon as an action is pending under Rule 4:5(a).[62]

Rule 4:5(b)(7), which relates to telephonic depositions, was recently amended to permit a judge, upon a proper motion, to allow such depositions to be taken. Formerly, telephonic depositions were allowed only upon the written stipulations of the parties and were therefore unavailable in those cases of parties, known and unknown, served by publication or otherwise, who did not appear and were thus in default. At one point in the amendment process it was proposed to delete the requirement (the second sentence of the subsection) that the deponent give his answers in the presence of the court reporter. However, this deletion would have increased the possibility of an imposter giving the deposition, since the court reporter would have been on the other end of the telephone. Furthermore, the deponent's attorney might have had the opportunity to write out the answers for the deponent to read over the phone, which could not be easily detected by the other parties or the reporter.

In medical malpractice cases, any party may remove part of the record for inspection and copying from the office of the clerk of court or the Executive Secretary of the supreme court.[63]

A subpoena duces tecum can be issued to a party or a non-party witness in a district court,[64] in proceedings under section 8.01-506 (which provides for judgment debtor interrogatories),[65] and in sessions before arbitrators.[66] A subpoena duces tecum under Rule 4:9 may be issued to persons who live out of state even if they cannot be served out of state.[67]

A suit may be dismissed for the failure to make the agreed upon discovery giving the names of expert witnesses to be used in a medical malpractice action.[68] In assessing attorney's fees under

62. Livingston v. Meany, 3 Va. Cir. 222 (Arlington County 1984).
63. Va. Code Ann. §§ 8.01-581.4:1, -581.4:2 (Cum. Supp. 1986).
64. *Id.* §§ 16.1-89, -131.
65. *Id.* § 8.01-506.1.
66. *Id.* § 8.01-581.06.
67. Missirlian v. Hall, 3 Va. Cir. 460 (Arlington County 1975).
68. Winfree v. Richmond Memorial Hosp., 3 Va. Cir. 387 (Richmond 1985).

Rule 4:12(a)(4), the court is not bound by the contract between the attorney and his client but may assess a reasonable fee.[69]

Sanctions for failure to make discovery cannot be levied against an uninsured motorist insurance carrier where the uninsured motorist cannot be found. However, if information is sought under the provisions of Part Four of the Rules of Court, the insurance company must give any information it has.[70] Therefore, when John Doe fails to answer interrogatories or fails to appear to give a deposition, the plaintiff cannot have summary judgment.[71]

Although statutory beneficiaries of an estate are entitled to be present at litigation concerning the estate, such litigation is conducted only by the personal representative, and only the representative can compel discovery from the defendants.[72]

A plaintiff will not be required to submit to a second medical examination under Rule 4:10 simply because the first was conducted by a different physician for the insurance company before the action was brought. Under Rule 4:9(c), a physician need only produce the report given to the patient, the results of tests in connection therewith, the medical history of the patient, and the names of other physicians consulted, but not the patient's entire file.[73]

B. *Scope*

The origin of the present discovery devices under Part Four of the Rules of Court lies in the traditional practice of the equity courts, and the traditional scope of discovery was limited to admissible, relevant evidence.[74] However, current Rule 4:1(b) expands the scope of discovery in modern practice to include any matter "relevant to the subject matter" of the suit (rather than only matter relevant to the issues pleaded), and any matter "reasonably calculated to lead to . . . admissible evidence" (rather than only admissible evidence itself). For example, evidence of post-accident changes of design is discoverable, but not admissible.[75] Rule 4:1(b)

69. Bell v. Rosenthal Chevrolet Co., 3 Va. Cir. 449 (Arlington County 1974).

70. VA. CODE ANN. § 38.2-2204(c)(Repl. Vol. 1986).

71. *See* Egan v. Jones, 1 Va. Cir. 235 (Richmond 1981).

72. Leary v. Broughman, 3 Va. Cir. 105 (Bath County 1983).

73. Hooper v. Russo, 4 Va. Cir. 475 (Arlington County 1978).

74. *E.g.*, Hornback v. Highway Comm'r, 205 Va. 50, 53, 135 S.E.2d 136, 138 (1964); Turner v. Binion, Hardres 200, 145 Eng. Rep. 452 (Exch. 1661).

75. Turner v. Manning, Inc., 216 Va. 245, 253, 217 S.E.2d 863, 869 (1975).

could be intepreted to allow fishing for everything that is not privileged. Such a broad interpretation, however, would permit gross abuse, harrassment, oppression, and expense incurred to the other parties and to witnesses. This rule cannot be adequately redrafted to permit reasonable and legitimate discovery and at the same time to prohibit abusive discovery. The solution lies in its reasonable interpretation by the courts. It is the opinion of this writer that the courts should be stricter than they are at present; the abuse of discovery has become one of the worst aspects of modern civil litigation. As the general rule is applied to individual factual situations, a body of case law will develop to guide attorneys in the future. The following opinions, then, are the beginning of such a process.

At a deposition, even questions that are irrelevant to the issues must be answered unless there is a valid claim of privilege.[76] However, the court will not require a party to respond to requests to admit that are unnecessary or of dubious relevance. A party may be requested to admit the genuineness of medical records but not the veracity of the contents of the records.[77]

The tax returns and past income of a former wife are totally immaterial to the issue of the former husband's liability for past-due child support because those payments are vested and the court cannot change the amounts due. Thus, such information is not discoverable.[78]

A defendant may be required to answer interrogatories as to the standard of medical care.[79]

It is not a valid objection to an interrogatory, in current practice, that the proponent already has the information. However, an interrogatory cannot require a complete summation of all evidence to be produced at the trial. An interrogatory may, however, ask for the names of all witnesses who have knowledge of the matters of the case.[80]

A party's prior conduct that is not relevant to the issues cannot

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76. *In re* Estate of Sampson, 3 Va. Cir. 248 (Alexandria 1984).

77. Schnedl v. O'Donnell, 3 Va. Cir. 113 (Alexandria 1983) (construing VA. SUP. CT. R. 4:11).

78. Johnson v. Johnson, 1 Va. App. 330, 332, 338 S.E.2d 353, 355 (1986).

79. Goodwin v. Arlington Hosp. Ass'n, 3 Va. Cir. 362 (Arlington County 1985); *cf.* Simpson v. Larson, 1 Va. Cir. 223 (Pulaski County 1981).

80. North American Eng'g Co. v. Vukic, 3 Va. Cir. 416 (Arlington County 1970).

be the subject of discovery.[81]

Upon appeal, the Board of Zoning Appeals is subject to discovery as to matters of additional evidence under Rule 4:0 in Part Four of the Rules of Court. Any officer or agent of the Board may respond.[82] On the other hand, it has been ruled that discovery under Part Four is not available in a judicial proceeding under section 60.1-67.1 to review a decision of the Virginia Employment Commission.[83]

C. *Privileges*

Discovery procedures cannot be used to require self-incrimination in civil cases. Unless authorized by statute, use immunity cannot be granted. The privilege against self-incrimination, however, does not apply to records kept as required by law.[84]

State tax returns are confidential unless a judge finds that the ends of justice require otherwise. If the information sought can be obtained from other sources, or if it is not of high probative value, the tax returns should be kept confidential pursuant to section 58-48.4.[85]

Letters sent to an attorney that contain opinions regarding pending litigation are privileged from discovery.[86] A non-party witness is entitled under Rule 4:1(b)(3) to have a copy of any statement previously made by him, including a copy of a tape recorded interview. This is an exception to the work-product privilege.[87]

Where the employees of the defendant have given statements to the defendant immediately following the occurrence and, two years later, refuse to give information to the plaintiffs under the instructions of the defendant, the court will override the work product privilege and order copies of the statements to be produced under Rule 4:9.[88]

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81. Klein v. Dart Drug Corp., 3 Va. Cir. 451 (Arlington County 1974).

82. Joynt v. Board of Zoning Appeals, 3 Va. Cir. 65 (Alexandria 1982).

83. Walker v. Virginia Employment Comm'n, 3 Va. Cir. 67 (Bath County 1982).

84. City of Alexandria v. Thorne, 3 Va. Cir. 27 (Alexandria 1981); *see also* Green v. Sixty-Seventh Co., 1 Va. Cir. 115 (Richmond 1972).

85. Commonwealth v. Krbec, 3 Va. Cir. 165 (Virginia Beach 1984).

86. Shirley Contracting Corp. v. King, 3 Va. Cir. 149 (Arlington County 1984).

87. Putnam v. Schulz, 3 Va. Cir. 351 (Richmond 1985).

88. *See* Brugh v. Norfolk & Western Ry., 4 Va. Cir. 477 (Botetourt County 1979) (applying VA. SUP. CT. R. 4:1(b)(3)).

IX. Levies and Seizures

At the last session of the General Assembly, a large number of small changes were made to further protect defaulting defendants, debtors, and tenants. These changes also will avoid possible constitutional problems with the statutes governing proceedings in detinue, fieri facias, pre-judgment attachments, and distress for rent.[89] Similar improvements to the statutes providing for garnishments were made in 1984.[90]

Process to seize property in actions in detinue under section 8.01-114 can no longer be issued by clerks of court; they now may only be issued by judges or magistrates. Section 55-230 was similarly amended so that only judges and magistrates may issue distress warrants.

The statutory provisions for detinue,[91] writs of fieri facias,[92] pre-judgment attachments,[93] and distress for rent[94] have been modified to require that the writs, as well as a form for requesting a hearing on exemptions from levy or seizure, be served on the defendant. Such a hearing is claimed by the defendant's filing the request with the clerk of the court. The clerk will thereupon schedule the hearing to be held within ten business days and must notify all interested parties thereof.

X. Juries

There is a right to a jury trial on factual issues regarding the validity of a release. The validity of a release and the merits of the case should be tried by separate juries.[95]

In a dispute over the location of a right of way, the parties have a right to a jury trial regarding the common-law right to the easement. Although one party may get a preliminary injunction to require the other to maintain the status quo *pendente lite*, the equity judge may not transfer the entire dispute to the equity side of the court because this would deprive the parties of their right to a

89. 1986 Va. Acts 568-73.
90. Va. Code Ann. §§ 8.01-511, -512.4, -512.5 (Cum. Supp. 1986).
91. *Id.* §§ 8.01-114, -115, -119.
92. *Id.* §§ 8.01-466, -477.1, -483, -487.1.
93. *Id.* §§ 8.01-533, -546, -546.1, -546.2.
94. *Id.* §§ 55-230, -232, -232.1, -232.2 (Repl. Vol. 1986).
95. Bolen v. Overnite Transp. Co., 3 Va. Cir. 345 (Richmond 1985).

common law trial by jury. After title to the easement has been determined, then the injunction may be made permanent or there may be an action at common law for trespass to property, depending upon the outcome of that litigation.[96]

On the subject of juries, it has been proposed several times recently that there be no classes of persons who are exempt from service on juries. The lists of exempt persons contained in sections 8.01-341 and 8.01-341.1 is extraordinary; it appears that any group of people that is sufficiently well organized to have a lobbyist in the corridors of the General Assembly is exempt from jury duty. If one is entitled to a jury that is representative of the entire community, then this situation should not exist. Many of the jurisdictions that have abolished exemptions from jury service have eased the inconvenience of service by the "one-day/one-trial" rule. By this rule, a person is required to appear for jury duty on one day only and, if he is empaneled, he sits for only one trial. If, however, he is not empaneled, he has no further obligation. These are worthy proposals, and it is hoped that they will receive further consideration.

XI. Incidents of Trial

A commissioner in chancery is not a delegate of the judge. A commissioner's report, though not entitled to the weight given to a jury's verdict, should be accepted unless clearly erroneous.[97]

Where a jury finds for a defendant and indirectly favors a third-party defendant, the latter is not a prevailing party for the purpose of receiving court costs.[98]

The words "amount recovered" in section 8.01-35.1 refer to the judgment recovered and not to the amount actually paid by each tortfeasor.[99]

In *Ambiance Associates, Inc. v. Kilby*,[100] the court ruled that a verdict that has been set aside cannot be reinstated by the trial judge. This writer, however, agrees with the dissenting opinion in the case. Although it was not mentioned in the dissent, the supreme court has the power to reinstate a verdict. Thus, the verdict

96. Stanardsville Volunteer Fire Co. v. Berry, 229 Va. 578, 331 S.E.2d 466 (1985).
97. Collins v. Collins, 3 Va. Cir. 224 (Arlington County 1984).
98. Winston v. Diehl, 3 Va. Cir. 129 (Henrico County 1983).
99. West v. Community Hosp., 3 Va. Cir. 258 (Roanoke 1984).
100. 230 Va. 60, 334 S.E.2d 556 (1985).

is not "void." The trial judge should also have the power to reinstate the verdict as long as his jurisdiction continues.

XII. Appeals from Circuit Courts

The requirement of Rule 5A:6(a), that a notice of appeal to the court of appeals be filed with the clerk of that court within thirty days after the final judgment, is not jurisdictional; on the other hand, the failure to make a timely filing with the clerk of the circuit court is mandatory and jurisdictional.[101]

It is a mandatory part of the appeals process that a transcript or a written statement of facts be filed with the appellate court. Rule 5A:3(b) permits the circuit court judge to extend the deadline for filing a transcript, but the court of appeals has not been given such power.[102]

The General Assembly enacted a new subsection (L) to Code section 8.01-676.1. This subsection declares that the failure to file a *timely* appeal bond with the supreme court or the court of appeals is no longer jurisdictional. Now an appellate court judge may extend the deadline for filing an appeal bond in his court. Although the statute is silent on the point, it is submitted that an extension of time can also be granted after the expiration of the deadline where this would attain the ends of justice. This new subsection overrules several recent cases which held that, under the statute before the amendment, the timely filing of an appeal bond was mandatory and jurisdictional and beyond the aid of the present Rules 5:24 and 5A:17(b).[103]

XIII. Miscellaneous

Where a defendant inadvertently files his responsive pleading in the wrong circuit court, this is a clerical mistake that can be cured under section 8.01-428(B), and the court may set aside a default

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101. Turner v. Commonwealth, 2 Va. App. 96, 341 S.E.2d 400 (1986); Johnson v. Commonwealth, 1 Va. App. 510, 339 S.E.2d 919 (1986); Williams v. Landon, 1 Va. App. 206, 336 S.E.2d 907 (1985) (habeas corpus).

102. *Turner*, 2 Va. App. 96, 341 S.E.2d 400; Barrett v. Barrett, 1 Va. App. 378, 339 S.E.2d 208 (1986).

103. *See* Rudiger & Sons v. Hanckel-Smith Sales Co., 230 Va. 255, 335 S.E.2d 257 (1985); Duckett v. Duckett, 1 Va. App. 279, 337 S.E.2d 759 (1985); Burns v. C. W. Wright Constr. Co., 1 Va. App. 256, 336 S.E.2d 908 (1985).

judgment.[104] Similarly, an inconsistency in a final decree for child support is considered to be a mere clerical mistake.[105] Where a person intends to do one thing but inadvertently does another, this is also a clerical error that can be corrected by a nunc pro tunc order. The court can correct such errors made by counsel as well as those made by itself and its clerk.[106]

When the liability of an employer is based solely upon the doctrine of respondeat superior, there can be no recovery against him when the employee has been discharged from liability for damages caused by the act of the employee.[107]

Section 8.01-35.1, which states that the release of one joint tortfeasor does not release the other, also includes those parties who may be vicariously liable. This statute does not use the words "joint tortfeasors" but rather "persons liable in tort for the same injury."[108]

Rule 1A:4 was recently amended to require that when a foreign attorney associates himself with a member of the Virginia State Bar as local counsel in a particular suit, the local attorney must sign all pleadings and papers, including those relating to discovery.

As to cross-bills against plaintiffs in equity, Rule 2:13 was recently amended to require plaintiffs to respond within twenty-one days after *service*, rather than after *filing*, of the cross-bill. This technical amendment avoids the possibility of the defendant's filing a cross-bill and not giving the plaintiff any notice of it until after the twenty-one days has expired (the cross-bill then being deemed admitted under Rule 1:4(e)). Such a maneuver was never anticipated by the orignal drafters of the rule.

Within ten days after a chairman of a medical malpractice review panel is appointed, he is to advise the parties of the date he has set for the completion of discovery. This date is to be within ninety days of his appointment unless good cause is shown for a longer period. The date set for the hearing shall not be sooner than ten days after the completion of the discovery.[109]

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104. Zaki v. Abell, 3 Va. Cir. 232 (Arlington County 1984).

105. Cass v. Lassiter, 3 Va. Cir. 260 (Virginia Beach 1984), *rev'd on other grounds*, 2 Va. App. 273, 343 S.E.2d 470 (1986).

106. *In re* Warren, 4 Va. Cir. 144 (Shenandoah County 1983).

107. Haskins v. Tepper Bros. Realty Co., 4 Va. Cir. 389 (Richmond 1970).

108 Thurston Metals, Inc. v. Taylor, 231 Va. ___, 339 S.E.2d 538 (1986); Bacher v. Vulcan Materials Co., 1 Va. Cir. 314 (Fairfax County 1982).

109. VA. CODE ANN. § 8.01-581.3:1 (Cum. Supp. 1986).

The Uniform Arbitration Act[110] was passed by the last session of the General Assembly. This comprehensive legislation, for the most part, codifies the established common law. One important change is in section 8.01-581.06, which allows the arbitrators to issue subpoenas to witnesses, to compel the production of documents, and to permit depositions *de bene esse*. Under section 8.01-581.04(3), the powers of the arbitrators are exercised by a majority unless it is otherwise agreed; whereas at common law, the arbitrators must act unanimously unless it is otherwise agreed.[111] Appeals are allowed from interlocutory orders compelling arbitration or staying arbitration.[112] Under former section 8.01-580, an arbitrator's award will be set aside if based upon a "palpable error of gross inattention."[113] Perhaps, under the new statute, the court will modify the award by correcting the miscalculation or mistake in the description under subsection 8.01-581.011(1).

Code section 49-7 was amended to restate the settled practice and to clarify the statutory law that allows an attorney to sign an affidavit on behalf of a corporation or other entity. This amendment was added to overrule the erroneous opinion in *Luke v. Dalow Industries, Inc.*,[114] and so the words "other entity" should be construed to refer to any person or litigant.

110. *Id.* §§ 8.01-581.01 to -581.016.

111. Fraley v. Nickels, 121 Va. 377, 93 S.E. 636 (1917).

112. VA. CODE ANN. § 8.01-581.016 (Cum. Supp. 1986).

113. Hot Springs Lodge No. 1817, Loyal Order of Moose v. Virginia Hot Springs, Inc., 3 Va. Cir. 163 (Bath County 1984).

114. 566 F. Supp. 1470 (E.D. Va. 1983).